

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MEADEN SCREW PRODUCTS, CO.

and

Case 13-CA-34483(E)

BRIAN FREID, an Individual

SUPPLEMENTAL DECISION AND ORDER

WILLIAM G. KOCOL, Administrative Law Judge. On May 15, 1998, the National Labor Relations Board issued a Decision and Order in this case.¹ Thereafter, on June 2, 1998, Respondent filed an Application for Fees and Expenses under the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325 and Section 102.143 of the Board's Rules and Regulations, and a Motion to Withhold Confidential Financial Information from Public Disclosure. That same day the Board referred those matters to me for appropriate action. On June 5, 1998, Respondent filed a Petition to Increase Maximum Attorney Fee Rates. On June 30, 1998, the General Counsel filed a Motion to Dismiss Respondent's Application and Alternative Motion to Strike Portions of Said Application. On July 10, 1998, Respondent filed a Reply Brief in Support of the Application. On August 3, 1998, Respondent filed a Revised Itemization of EAJA Recovery Sought. Treating this as a motion to amend the application, on August 6, 1998, I issued an Order granting Respondent's request to amend the application. On August 14, 1998, the General Counsel filed a Response to Respondent's Revised Itemization.

Discussion

On the entire record in this case, and after considering the arguments made by the General Counsel and Respondent, I make the following findings of fact. On September 8, 1998, I issued an Order which I adopt as part of this Decision. In that Order I resolved the issues raised by the General Counsel's Motion to Dismiss. I concluded that the General Counsel was substantially justified in some respects but was not substantially justified in other respects. I further concluded that Respondent was not entitled to the full amount of fees that it had requested. Thereafter, pursuant to my request Respondent filed a revised schedule of fees and expenses that was consistent with the Order. That revised schedule is also made part of this Decision. Although the General Counsel was given 10 days to file any objections to the revised schedule, it did not file any objections. I therefore conclude that the amount of fees and expenses set forth in the revised schedule, in the amount of \$30,909.12, is consistent with the Order.

¹ 325 NLRB No. 142.

On October 8, 1998, the General Counsel filed an answer. The answer admitted that Respondent meets the eligibility requirements under EAJA. The answer also pled a number of affirmative defenses. The answer then goes on to attempt to relitigate the issue of whether the General Counsel was substantially justified. On October 30, 1998, Respondent filed a reply to the General Counsel's answer

I conclude that the General Counsel may not relitigate the issue of substantial justification in an answer where the General Counsel has already chosen to litigate that issue by filing a motion to dismiss. As indicated, the General Counsel raised the issue of his substantial justification in the motion to dismiss. The General Counsel had a full opportunity to make a complete record in that regard and present whatever arguments he thought appropriate. I then resolved those issues. The General Counsel now attempts to supplement the record and make additional arguments on that issue.² I conclude that the General Counsel may not now do so; the General Counsel is not entitled to two bites at the apple. The Board has consistently held that the General Counsel is not a preferred party in Board proceedings. No party is entitled to raise an issue and then, after the issue is decided and it has the benefit of the judge's ruling, supplement the record and make additional arguments on the issue that has already been decided.³ Common notions of fairness and efficiency require that this not be allowed. Moreover, such a procedure would render any ruling on the merits of a motion to dismiss meaningless, since such a ruling would not be a final disposition of the issues raised. Accordingly, I shall strike from the General Counsel's answer those portions that seek to relitigate the issue of substantial justification and supplement the record.⁴

Conclusions of Law

1. Respondent is eligible to receive fees and expenses under EAJA and the Board's rules.

2. Respondent is a prevailing party as defined in EAJA and the Board's rules.

3. The General Counsel was substantially justified in issuing complaint alleging Freid's unlawful discharged.

² I have examined the answer and have determined that it does not contain newly discovered or previously unavailable matters. Further, in the event that the full answer was to be considered, I conclude that it would not change the results set forth in the Order.

³ For example, had I granted the motion to dismiss, Respondent would be entitled to appeal that ruling to the Board. It could not, however, then add to the record and make additional arguments based thereon.

⁴ The General Counsel's processing of this case continues to be troubling. As is now apparent, there was no dispute concerning Respondent's eligibility and there were no credibility matters warranting a hearing in this case. The only issues were whether the General Counsel was substantially justified and the amount of money Respondent was entitled to. Both of these issues were resolved in the Order. Months ago I suggested to the parties that, under these circumstances, my ruling on the General Counsel's motion to dismiss would resolve all issues and make this case ready for final disposition. The General Counsel, however, insisted on filing an answer that we now see contained nothing that could not have been submitted months ago! This posture delayed the final disposition of the case and caused unnecessary expense.

4. The General Counsel was not substantially justified in filing exceptions to my earlier decision in this case.

5. The General Counsel's settlement posture in this case was not substantially justified.

6. The General Counsel's motion to strike attorney's fees charged in excess of \$125 per hour is granted.

7. The General Counsel's motion to strike fees and expenses associated with the settlement efforts in this case is denied.

8. The General Counsel's motion to strike \$1200 in fees and expenses associated with the brief that Respondent prepared but that was rejected by the Board is granted.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The General Counsel shall pay to Respondent the sum of \$30,909.12 computed as of August 19, 1998, plus any additional allowable fees and expenses that Respondent has incurred since then in connection with the litigation of this case.

Dated, Washington, D.C. November 10, 1998

William G. Kocol
Administrative Law Judge

⁵ If no exceptions are filed as provided by Sec. 102.154 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.